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Intelligence Identities Protection Act

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Summary

Recent news accounts have focused attention on the question of whether disclosure of the identity of a United States intelligence agent could give rise to criminal liability. In 1982, Congress passed the Intelligence Identities Protection Act, P.L. 97-200. The Act, as amended,¹ is codified at 50 U.S.C. §§ 421-426. Under 50 U.S.C. § 421 criminal penalties are provided, in certain circumstances, for intentional, unauthorized disclosure of information identifying a covert agent, where those making such a disclosure know that the information disclosed identifies the covert agent as such and that the United States is taking affirmative measures to conceal the covert agent's foreign intelligence relationship to the United States. Other sections of the Act provide exceptions and defenses to prosecution, make provision for extraterritorial application of the offenses in section 421, include reporting requirements to Congress, and set forth definitions of the terms used in the Act. There do not appear to be any published cases involving prosecutions under this Act.

In 1982, the Intelligence Identities Protection Act was enacted into law as an amendment to the National Security Act of 1947. This Act was a response to concerns of members of the House and Senate Intelligence Committees and others in Congress "about the systematic effort by a small group of Americans, including some former intelligence agency employees, to disclose the names of covert intelligence agents."² The Senate Judiciary Committee's report also discussed the efforts of Philip Agee, Lewis Wolf, and others to identify and disclose U.S. intelligence officers as part of "a systematic

¹ Act of July 26, 1947, c. 343, Title VI, §§ 601-606, as added by P.L. 97-200, § 2(a), 96 Stat. 122 (June 23, 1982). The definitions section, 50 U.S.C. § 426, and fine provisions, 50 U.S.C. §§ 421(a), (b), and (c), were amended in 1999 by P.L. 106-120, Title III, §§ 304(a) and (b), 113 Stat. 1611 (Dec. 3, 1999), while the defenses and exceptions provision in 50 U.S.C. § 422 and the reporting requirements in 50 U.S.C. § 423 were amended in 2002 by P.L. 107-306, Title III, §§ 353(b)(1)(B), 353(b)(9), and Title VIII, § 811(b)(1)(E), 116 Stat. 2402, 2422 (Nov. 27, 2002).

² S. Rep. 97-201, at 1, *reprinted in* 1982 U.S.C.C.A.N. 145. In this report, the Senate Judiciary Committee reviewed the legislative history of S. 391 and the companion bill, H.R. 4, and their predecessors beginning with proposals in the 94th and 95th Congresses. The Congress passed H.R. 4, in lieu of the Senate bill, after amending the House bill to encompass much of the language of the Senate bill.

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effort to destroy the ability of [U.S.] intelligence agencies to operate clandestinely,” and their apparent repercussions.³ Such disclosures preceded and may have contributed to circumstances resulting in the death or attempted assassination of some CIA officers, expulsion of others from a foreign country following charges of spying, and impairment of relations with foreign intelligence sources. Two of Agee’s books revealed over 1,000 names of alleged CIA officers. Wolf was co-editor of the “Covert Action Information Bulletin,” a publication which contained a section entitled “Naming Names.” Wolf claimed to have revealed the names of over 2,000 CIA officers. He also provided addresses, phone numbers, license tag numbers, and colors of the automobiles of some alleged intelligence agents.⁴ Such calculated disclosures set the stage for the consideration and passage of the Intelligence Identities Protection Act.

The criminal provisions of the Act are contained in 50 U.S.C. § 421:

§ 421. Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

(a) Disclosure of information by persons having or having had access to classified information that identifies covert agent

Whoever, having or having had authorized access to classified information that identifies a covert agent, intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent’s intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than ten years, or both.

(b) Disclosure of information by persons who learn identify of covert agents as result of having access to classified information

Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent’s intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than five years , or both.

(c) Disclosure of information by persons in course of pattern of activities intended to identify and expose covert agents

³ S. Rep. 97-201, at 1-7, *reprinted in* 1982 U.S.C.C.A.N. at 145-51. S. Rep. 97-201, 7-10, *reprinted in* 1982 U.S.C.C.A.N. at 151-54. *See also*, H.R. 4, *The Intelligence Identities Protection Act: Hearings before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 97th Cong., 1st Sess. (1981); *Intelligence Identities Protection Act of 1981 — S. 391: Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

⁴ S. Rep. 97-201, at 7-10, *reprinted in* 1982 U.S.C.C.A.N. at 151-54.

Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined under Title 18 or imprisoned not more than three years, or both.

(d) Imposition of consecutive sentences

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

Each of these offenses is a felony. Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

The offenses set forth in 50 U.S.C. §§ 421 (a), (b), and (c) share some elements in common: (1) intentional disclosure⁵ of the identity of a covert agent⁶ (2) to someone not authorized to receive classified information, (3) knowing that the information disclosed

⁵ 50 U.S.C. § 426 (3) defines “disclose” to mean “to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise make available.”

⁶ 50 U.S.C. § 426(4) defines “covert agent” to mean:

(A) a present or retired officer or employee of an intelligence agency or a present or retired member of the armed forces assigned to duty with an intelligence agency —

(i) whose identity as such an officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States; or

(B) a United States citizen whose intelligence relationship to the United States is classified information, and —

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, and intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation; or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

identifies that agent, and (4) knowing further that the United States is taking affirmative measures to conceal the agent's intelligence relationship with the United States.

Subsections 421(a) and (b) contemplate offenses where the perpetrator has or has had authorized access to classified information, while subsection 421(c) has no similar requirement. Under 50 U.S.C. § 421(a), an offender must have or have had access to classified information which identifies a covert agent. Under 50 U.S.C. § 421(b), the perpetrator must have learned the identity of a covert agent as a result of having authorized access to classified information. In contrast to these provisions, subsection 421(c) does not require that the perpetrator have or have had authorized access to classified information. Rather, it provides that the perpetrator must disclose the identity of the covert agent (1) in the course of a pattern of activities intended to identify and expose covert agents, and (2) must make the disclosure with reason to believe that his or her activities would impair or impede U.S. foreign intelligence activities. Subsection 426(10) defines a "pattern of activities" as involving "a series of acts with a common purpose or objective."

Much of the focus of attention during the consideration of the measure was upon subsection 421(c), and its First Amendment implications.⁷ The Senate Judiciary and the Conference Committee addressed these concerns at length. Both concluded that the language of the measure would pass constitutional muster.⁸ The Conference Committee characterized the goal of the provision as follows:

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of covert agents' identities in such a course designed, first, to make an effort at identifying covert agents and, second, to expose such agents publicly. The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to identify U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly ... serves no legitimate purpose. It does not alert to abuses; it does not further civil liberties; it does not enlighten public debate; and it does not contribute one iota to the goal of an educated and informed electorate. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy....

The standard adopted in section 601(c) applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules.⁹

⁷ U.S. CONST. Amend I. H. Conf. Rep. 97-580, at 6-8; *reprinted in* 1982 U.S.C.C.A.N., at 170-72.

⁸ S. Rep. 97-201, at 14-18; *reprinted in* 1982 U.S.C.C.A.N., at 158-62; H. Conf. Rep. 97-580, at 7-10; *reprinted in* 1982 U.S.C.C.A.N., at 171-75.

⁹ H. Conf. Rep. 97-580, at 7-8; *reprinted in* 1982 U.S.C.C.A.N., at 171-72.

The Conference Committee distinguished between the main purpose of a person engaged in “the business of ‘naming names,’” whose intent is to identify and expose covert agents, and side effects of one’s conduct that one “anticipates but allows to occur.” “Those who republish previous disclosures and critics of U.S. intelligence would all stand beyond the reach of the law if they did not engage in a pattern of activities intended to identify and expose covert agents.”¹⁰ Despite these assurances, some commentators have questioned the constitutional sufficiency of subsection 421(c) on First Amendment grounds, finding it overbroad, and questioning the absence of a specific intent requirement instead of the “reason to believe” standard.¹¹ The courts have yet to consider the issue.

Under 50 U.S.C. § 422, it is a defense to a prosecution under 50 U.S.C. § 421 that, prior to the commission of the offense, the United States publicly acknowledged or revealed the intelligence relationship to the United States of the covert agent involved. In addition, this provision precludes prosecution of anyone other than the person who made the disclosure of the identity of a covert agent for a section 421 offense on the grounds of misprision of felony, aiding and abetting, or conspiracy, unless the elements of subsection 421(c) are satisfied. Nor is it an offense against section 421 for a person to transmit information directly to either the House or Senate intelligence committees. An agent cannot be prosecuted for disclosing just his own identification as a covert agent.

Section 423 requires the President, after receiving information from the Director of Intelligence, to report to the House and Senate intelligence committees annually on measures to protect covert agents, and other relevant information. Such reports are exempt from any publication or disclosure requirement.

Section 424 authorizes extraterritorial jurisdiction where the offender is a U.S. citizen or a permanent resident alien.

Under section 425, the Act may not be construed to permit withholding of information from Congress or a committee of the House or Senate. Finally, section 426 includes the definitions of terms used in this subchapter.

There do not appear to be any published cases involving prosecutions under this Act. Depending upon the circumstances of a given case, other criminal statutes may also be implicated.¹²

¹⁰ H. Conf. Rep. 97-580, at 9-10; *reprinted in* 1982 U.S.C.C.A.N., at 173-74.

¹¹ “Note: The Constitutionality of the Intelligence Identities Protection Act,” 83 Colum. L. Rev. 727 (1983); “Note: The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c),” 49 Brooklyn L. Rev. 479 (1983).

¹² *See, e.g.*, 18 U.S.C. § 111 (assaulting, resisting or impeding federal officers or employees while engaged in or on account of the performance of official duties); 18 U.S.C. § 371 (conspiracy to commit a federal offense); 18 U.S.C. § 641 (theft or knowing conversion to one’s own use or the use of another of government property or thing of value); 18 U.S.C. § 793 (gathering, transmitting, or losing information relating to the national defense); 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government; among other things, this section provides for a possible death penalty upon conviction upon a finding that the offense resulted in the identification by a foreign power of an individual acting as an agent of the United States).

(continued...)

¹² (...continued)

States and consequently resulted in the death of that individual); 18 U.S.C. § 1114 (killing or attempting to kill an officer or employee of the United States or an agency thereof while the officer or employee is engaged in or on account of performance of official duties). For a recent discussion of the application of 18 U.S.C. § 641 to leaks of confidential government information, see “Stealing Information: Application of a Criminal Anti-Theft Statute to Leaks of Confidential Government Information,” 55 Fla. L. Rev. 1043 (2003).